obey its decrees. Such disobedience though called contempt is entirely different from criminal contempt. Obstructing the course of justice is a third kind of contempt,[14] but avoiding summons scarcely falls within it. In the first place, it may be argued that if a defendant absents himself the trial will merely be delayed, while if a witness does not appear an unjust verdict may be obtained. Again, it would seem that the true function of a court is to give remedies solely to those who, having suffered a wrong, ask redress against a wrongdoer over whom the court has jurisdiction. If the summons is for a wrongdoer only temporarily present, the court has no jurisdiction unless he is personally served.[15] Avoiding service, then, has the effect of preventing a court from securing jurisdiction and does not obstruct it in the exercise of its functions. If the wrongdoer is domiciled in the territorial jurisdiction, the court may render judgment without personal service,[16] and his concealment is merely a delay. Since there seems to be no such crime as delaying the course of justice, avoiding summons would seem not to be a crime.[17]

LIABILITY OF GRATUITOUS AGENT FOR NON-FEASANCE. — A recent case holds that one who gratuitously undertakes to conduct a transaction as agent for another, and begins to act under the authority conferred, is liable in tort for failure to complete the transaction, notwithstanding his principal was not prejudiced by what he had actually done. *Condon* v. *Exton-Hall Brokerage & Vessel Agency*, 142 N. Y. Supp. 548.[1] In this case the defendant, having gratuitously agreed to procure the immediate cancellation of an insurance policy issued by the plaintiff, delayed doing this while his sub-agent was investigating the risk, and before the investigation had been completed the loss occurred. The court argues that the agent in this case committed a misfeasance; but a misfeasance is a culpable act causing damage to the plaintiff,[2] while here the damage is due, not to the defendant's act, but to his failure to perform an undertaking. To support the decision, therefore, it must be held that the defendant has in some way assumed a legal duty to perform what he has agreed.

It has been ingeniously contended that there is a class of duties which

[14] State *ex rel.* Morse *v.* District Court, 29 Mont. 230, 74 Pac. 412. In this case a court was obstructed in considering a writ of habeas corpus by the defendant handing the body over to extradition knowing of the writ but before service, and thus putting it out of the court's control. The Cape May and Schellenger's Landing R. Co. *v.* Johnson, 35 N. J. Eq. 422. Here the defendant knowing of an injunction but before he had been officially notified, disobeyed it. In both cases fines were imposed.

[15] See Melkop and Kingman *v.* Deane and Co., 31 Ia. 397, 402.

[16] Henderson *v.* Standiford, 105 Mass. 504.

[17] The case where the defendant resists the process server with physical force is clearly distinguishable. He is guilty of a crime (see Conover *v.* Wood, 5 Abb. Prac. 84, 88), because the public good requires officers to perform their functions without overcoming resistance. (See 1 BISHOP, CRIMINAL LAW, 7 ed., sec. 465.)

[1] The following decisions might be thought to support the result in the principal case: Wilkinson *v.* Coverdale, 1 Esp. 75; Johnston *v.* Graham, 14 U. C. C. P. 9; see also Thorne *v.* Deas, 4 Johns. (N. Y.) 84, 97; Vickery *v.* Lanier, 1 Metc. (Ky.) 133, 135.

[2] Bell *v.* Josselyn, 3 Gray (Mass.) 309; Illinois Central R. R. Co. *v.* Foulkes, 191 Ill. 57, 68, 60 N. E. 890; see 2 BOUVIER'S LAW DICTIONARY, 421.

are assumed independently of contract by those who voluntarily interfere in others' affairs.[3] But the decisions which seem to support this view really do nothing but enforce the general duty of every man to so conduct himself that his acts shall not injure others. Thus, where the defendant's interference, though beneficial in a way, exposes the plaintiff to some new risk of injury, the defendant must be diligent to prevent that injury from occurring.[4] So, also, where the defendant, by giving his aid, excludes the probable assistance of others, he may not abandon the plaintiff without restoring to him full opportunity to receive other assistance.[5] Likewise, one who induces others to rely on the efficacy of his executed acts to produce a certain result is liable to them, if, through his negligence, the reliance results in damage.[6] None of these doctrines involve the proposition that to touch another's affairs is to assume a duty to make good all the benefits to accomplish which the interference was first undertaken. True, the principle which makes a defendant liable to one whom he has induced to rely on the efficacy of his past conduct, ought equally to make him liable for non-performance of his promise to one who takes a risk in reliance on that; but it seems too late to contend that such is the law, for where the plaintiff has relied solely on a promise, he must prove consideration.[7]

Still another analogy which the decisions have failed to recognize tends to support the principal case. Under the Roman law the recipient of either a chattel or a power of attorney became a "mandatary," bound to apply the chattel or the power to the purposes for which it was given.[8] A like doctrine in respect to bailments has been recognized at common law, with the help of the theory that the delivery of the chattel constitutes consideration for any promise the bailee may make in relation to it.[9] But consideration, in the usual sense of something bargained for,[10] is not present in the case where the bailee takes the chattel with the sole purpose of doing the bailor a favor. Nevertheless, the result seems to be good law to-day. Apparently the law treats a bailee for

[3] BEALE, GRATUITOUS UNDERTAKINGS, 5 HARV. L. REV. 222.

[4] Such a case arises where the defendant helps the intoxicated plaintiff half-way up a flight of stairs, and leaves him. Black *v.* New York, N. H. & H. R. R. Co., 193 Mass. 448, 79 N. E. 797. The resulting duty is to get the plaintiff safely off the stairs, not necessarily to take him to the top. The same principle is involved with others in Cincinnati, N. O. & T. P. Ry. Co. *v.* Marrs' Adm'x, 27 Ky. L. Rep. 388, 390, 85 S. W. 188, 189.

[5] As where one living alone in charge of a helpless invalid neglects either to care for her or call in others to do so. Regina *v.* Instan, [1893] 1 Q. B. 460; *contra*, Rex *v.* Smith, 2 C. & P. 449.

[6] Gill *v.* Middleton, 105 Mass. 477; Gregor *v.* Cady, 82 Me. 131, 19 Atl. 802. It is submitted that Wilkinson *v.* Coverdale, *supra*, and Johnston *v.* Graham, *supra*, fall within this principle.

[7] Kirksey *v.* Kirksey, 8 Ala. 131; Thorne *v.* Deas, *supra*. See WALD'S POLLOCK ON CONTRACTS, 3 ed., 186. But see 26 HARV. L. REV. 429.

[8] See STORY, BAILMENTS, § 137; STORY, AGENCY, § 4, and authorities there cited.

[9] Coggs *v.* Bernard, 2 Ld. Raym. 909, 919; Whitehead *v.* Greetham, 1 McClel. & Y. 205, 211; Robinson *v.* Threadgill, 13 Ired. (N. C.) 39, 42.

[10] The old declaration in special assumpsit recites that whereas the plaintiff "at the special instance and request of" the defendant, gave consideration, "the defendant promised, etc." The idea of consideration here is evidently "the price for which the promise of the other is bought." Kirksey *v.* Kirksey, *supra*; WALD'S POLLOCK ON CONTRACTS, 3 ed., 185.

the bailor's benefit as a trustee of the possession, and binds him to perform all the terms of the bailment, precisely as equity holds the trustee of a legal title to perform all the terms of his trust.[11] If so, it ought logically to adopt the rest of the Roman doctrine of "mandate," and treat every power to act as agent as received in trust to effect the purposes for which it was conferred. But this would conflict with decisions which hold that neither the promise [12] nor the attempt [13] to carry out a transaction as agent, nor both together,[14] can create a duty to complete it. Inasmuch as either alone would, on principle, be an acceptance of the trust, the authorities must be taken as standing definitely against the suggested doctrine. It seems, therefore, that the rule of the principal case, making a gratuitous agent who begins to act liable for pure nonfeasance, while logically sound, cannot be supported on the decisions.

STATUTES AUTHORIZING ASSESSMENT OF PUNISHMENT BY THE JURY. — In several states an interesting change from the old common-law procedure has been effected by statutes which invest the jury with the judicial function of imposing sentence. In withdrawing this right from the judge, the purpose is to overcome the reluctance of juries, who, because of fear that the judicial sentence may be extreme, hesitate to convict a defendant who, they feel, deserves light punishment on account of extenuating circumstances.[1] The prisoner, particularly when he is accused of a crime against which popular indignation runs high, often prefers to plead guilty because of his belief that the trial judge will accord him a lighter penalty than would a prejudiced jury. This situation is expressly provided for in the type of statute which requires the jury in all cases to mete out the punishment,[2] and also in the statutes which expressly reserve to the court their sentencing power in case the defendant pleads guilty.[3] But there is another class of statutes which merely provides that the jury may add the prisoner's sentence to their verdict of guilty.[4] It is difficult to say whether in those jurisdictions an accused by pleading

[11] This proposition may seem novel. But if a gratuitous bailee is bound by his undertaking to feed the bailor's horse, it is difficult to see why he is not bound by other affirmative undertakings, as to transport a chattel, or present a note for payment. If the contract theory of these duties is abandoned, no alternative seems open except a "legal trust." The theory suggested seems to underly the reasoning in the following cases: Coggs *v.* Bernard, *supra*; Smith *v.* Lascelles, 2 T. R. 187, 190; Robinson *v.* Threadgill, *supra*; Boyer *v.* State Farmer's Mut. Hail Ins. Co., 86 Kan. 442, 121 Pac. 329. See also STORY, BAILMENTS, § 171.

[12] Thorne *v.* Deas, *supra*; Balfe *v.* West, 13 C. B. 466.

[13] Vickery *v.* Lanier, 1 Metc. (Ky.) 133.

[14] Morrison *v.* Orr, 13 Stew. & P. (Ala.) 49.

[1] See People *v.* Welch, 49 Cal. 174–179. An examination of the murder cases under one such statute shows this result is not always attained. As a general rule, juries under the California statute, instead of utilizing their power for the purpose of passing the light sentence on a person with some moral or other excuse, have given life imprisonment to persons who committed picturesque murders, and sentenced to death those whose methods were purely brutal. See SALEILLES, INDIVIDUALIZATION OF PUNISHMENT, Introduction to English Version by Prof. Roscoe Pound, p. xvi.

[2] Wartner *v.* State, 102 Ind. 51, 1 N. E. 65.

[3] People *v.* Noll, 20 Cal. 164.

[4] Territory *v.* Miller, 4 Dak. 173, 29 N. W. 7.